

as a Motion for Temporary Restraining Order and denied for failure to demonstrate irreparable harm. *Michigan Bell v. MFS Intelenet of Michigan, Inc.*, No. 5:98CV18, slip op. at 2 (W.D. Mich. Feb. 11, 1998) (Order issued by Judge Robert Holmes Bell, on behalf of Chief Judge Enslen, docket #3). On February 12, 1998, Plaintiff filed a Motion for Leave to Deposit Funds with the Court and a Motion for Approval of Supersedeas Bond and Stay Pending Appeal. On May 19, 1998, Plaintiff filed a Motion for Preliminary Injunction. Finally, on August 18, 1998, Plaintiff filed a Motion for Primary Jurisdiction Referral.³ These motions are presently pending before the Court.

II. ANALYSIS

A. Rule 62 Motion

Arguing that the instant case is, in effect, an appeal of a money judgment, Plaintiff asserts that it is entitled as a matter of right to a stay pending appeal pursuant to Rule 62(d). Defendants counter, however, that Rule 62(d) is inapplicable because the Commissioner's Order provides injunctive relief in that it requires Plaintiff to "cease and desist from failing to pay reciprocal compensation in accordance with its interconnection agreements." If any section of the Rule applies, Defendants continue, it would be 62(c) governing injunctions.⁴ See *Wisconsin Bell v. TCG Milwaukee, Inc.*, No. 98-C-366-C, slip op. at 6 (W.D. Wis. June 10, 1998). In addition, Defendants point out, and Plaintiff concedes, that Rule 62 is not directly applicable to the instant situation

³ The Parties have filed numerous other motions. They, however, are not pertinent to this ruling and, therefore, will be discussed herein.

⁴ (c) Injunction Pending Appeal. When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party. . . .

because it provides for a stay during the appeal from a federal court judgment, not a state administrative order. *Id.* Finding both of Defendants' arguments persuasive, the Court holds that Rule 62(d) specifically, and Rule 62 in general, are not applicable to the instant case. Plaintiff's Motion for a stay pursuant to Rule 62 is, therefore, denied.

B. Motion for Preliminary Injunction

Evidently in anticipation of just such a ruling, Plaintiff filed an alternative motion for stay pursuant to Federal Rule of Civil Procedure 65(a). A preliminary injunction is an extraordinary and drastic remedy not to be imposed unless the movant has, by a clear showing, met the burden of persuasion. *Mazurek v. Armstrong*, 117 S. Ct. 1865, 1867 (1997) (citation omitted). In considering such a motion, the district court must balance the following four factors: 1) the movant's likelihood of success on the merits; 2) whether the movant would suffer irreparable injury without the injunction; 3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of the injunction. *Connection Distributing Co. v. Reno*, ___ F.3d ___, No. 97-3092, 1998 WL 469170, *4 (6th Cir. Aug. 13, 1998). "These factors are to be balanced, not prerequisites which must be met." *Mercy Health Servs. v. 1199 Health & Human Serv. Employees Union*, 888 F. Supp. 828, 838 (W.D. Mich. 1995) (citing *In re DeLorean Motor Co.*, 755 F.2d 1223, 1229 (6th Cir. 1985)).

1. Likelihood of Success on the Merits

"In general, the probability of success on the merits that must be shown is inversely proportional to the degree of irreparable injury plaintiff will suffer absent an injunction." *Mercy Health Servs.*, 888 F. Supp. at 838. However, "the demonstration of a mere 'possibility' of success on the merits is not sufficient" *Id.* (quoting *Ohio ex rel. Celebrezze v. Nuclear Regulatory*

Comm'n, 812 F.2d 288, 290 (6th Cir. 1987)). "Ordinarily the party seeking a stay must show a strong or substantial likelihood of success. However, at a minimum the movant must show 'serious questions going to the merits and irreparable harm which decidedly outweighs any potential harm to the defendant if a stay is issued.'" *Id.* (quoting *Celebrezze*, 812 F.2d at 290).

The sole substantive question in this case is whether calls made from an individual telecommunications customer to an ISP within the same local calling area are "local" calls for which the Parties must pay reciprocal compensation. Plaintiff argues that, because: 1) calls to ISPs are mechanically akin to exchange access calls made to long distance carriers, 2) those calls involve communications with interstate, and often international locations, and 3) during the past 15 years, the Federal Communications Commission (FCC) has repeatedly noted that calls to ISPs are "jurisdictionally interstate" calls, calls made to ISPs are interstate calls for which Ameritech is not required to pay reciprocal compensation. Noting that every federal court and state administrative agency to confront this issue has reached the contrary conclusion and that both the FCC and Ameritech itself treat calls to ISPs as local calls for billing purposes, Defendants counter that Plaintiff's chance of success on the merits is slim to nonexistent.

Having reviewed Judge Coar's decision in *Illinois Bell Tel. Co., d/b/a Ameritech v. Worldcom Tech.*, No. 98 C 1925, 1998 WL 419493, *8-*13 (N.D.Ill. July 23, 1998),⁵ and found it

⁵ See also *Southwestern Bell Tel. Co. v. Public Utility Comm'n*, No. 98 CA 043, slip op. at 14-25 (W.D. Tex. June 16, 1998) (holding that calls to an ISP are "local traffic" and therefore eligible for reciprocal compensation); *U.S. West Comm. Inc. v. MFS Intelenet, Inc.*, No. C97-222WD, slip op. at 8 (W.D. Wash. Jan. 6 1998) (holding state commission had not acted arbitrarily and capriciously in deciding that LECs continue to pay and receive reciprocal compensation for calls made to Enhanced Service Providers, which include Internet Service Providers, within a local calling area).

persuasive, and noting that every one of the 19 regulatory agencies with expertise in this area that has addressed this specific issue has sided with Defendants, this Court finds it unlikely that Plaintiff will succeed on the merits of its claim. In addition, support for the holdings of these courts and agencies is found in the fact that both the FCC and Ameritech itself treat these calls as local calls. In the instant case, Ameritech bills its customers for such calls as local calls and the FCC, while noting that calls to ISPs are akin to exchange access calls made to long distance carriers, treats ISPs as end users within the local calling area for regulatory billing purposes. Pl. Br. Mot. Prelim. Inj. at 14-15. Furthermore, Ameritech itself apparently agreed with the contrary position when it was paying reciprocal compensation for over a year before the start of this controversy. Having considered the Parties' arguments, the Court finds that Plaintiff has failed to demonstrate a likelihood of success on the merits. Noting, however, that the FCC language on the subject is inconsistent, *Illinois Bell Tel. Co.*, 1998 WL 419493 at *8, and that the FCC has acknowledged this specific question is presently unresolved by taking it up for review, *Ex Parte Procedures Regarding Requests for Clarification of the Commission's Rules Regarding Reciprocal Compensation for Information Service Provider Traffic*, FCC Pub. Not. 96-98, Rel No. DA 98-1641, 1998 FCC LEXIS 4191 (Aug. 17, 1998), the Court nevertheless finds that Plaintiff has raised a serious question as to the appropriate resolution of this legal issue.

2. Irreparable Harm

To demonstrate irreparable harm, the moving party must identify "a noncompensable injury for which there is no legal measure of damages, or none that can be determined with a sufficient degree of certainty" *Nixon v. Kent County*, 790 F. Supp. 738, 749 (W.D. Mich. 1992). Thus, monetary losses will generally not be considered irreparable. *Basiccomputer Corp. v. Scott*, 973 F.2d

507, 511 (6th Cir. 1992). In evaluating the injury that may occur in the absence of an injunction, the Court should consider the substantiality of the injury alleged, the likelihood of its occurrence, and the adequacy of the proof provided. *Mercy Health Servs.*, 888 F. Supp. at 838.

Plaintiff asserts that there are three types of irreparable harm which it will suffer if an injunction is not granted: 1) the loss of customers and goodwill; 2) the subversion of interconnection agreement negotiations; and 3) harm to Ameritech's public switched network. While Plaintiff is correct that, under some circumstances, loss of customers and goodwill may serve as a basis for finding irreparable harm, such harm is often too speculative or insubstantial to justify preliminary injunctive relief. Such is the case here. Although Plaintiff argues that it has submitted substantial evidence that such harms will be substantial and will undoubtedly befall it, Ameritech offers only the self-serving affidavit of one of its own employees, Neil E. Cox, to support this conclusion. But even assuming that Mr. Cox's affidavit is completely accurate, the Court must conclude that this harm is too speculative to advocate in favor of granting Plaintiff's motion. Indeed, beyond failing to attempt to quantify the harm, Mr. Cox does not even allege it will be substantial; rather, he only states: "[i]t is impossible to project how many customers or how much goodwill Ameritech Michigan will lose if the MPSC Order is not stayed." Furthermore, the Court concurs with Judge Crabb's assessment of Plaintiff's argument on this point, and finds it unlikely that the Defendant LECs will engage in a whirlwind campaign to sign up ISP business when their legal footing is unsure. *Wisconsin Bell v. TCG Milwaukee, Inc.*, No. 98-C-366-C, slip op. at 7 (W.D. Wis. June 10, 1998).⁶ Moreover, even assuming that Plaintiff will experience some loss of customer goodwill, a

⁶ In addressing these precise issues, Judge Barbara Crabb stated the following:

decrease in its bargaining power and some degradation in its public switched network, Plaintiff has not demonstrated that these harms would be sufficiently substantial or likely to occur so as to compensate for its weak showing on the first prong of this test. In any event, the Court concludes that this prong of the test militates against granting the injunction.

3. Harm to Others and the Public Interest

With regard to the third prong of this test, Defendants argue that Plaintiff's continued withholding of reciprocal compensation is delaying Defendants' competitive entry into the local telecommunications market, thereby harming Defendants and the public by frustrating the very purpose of the Telecom Act. By preventing the new entrants into the local communications market from receiving compensation on which they came to rely during the year when Plaintiff chose to pay the costs at issue, the incumbent Plaintiff has in effect blocked the competition the Act seeks to

Plaintiff attempts to establish three independent irreparable harms it will suffer if the stay is not issued: a loss of customers and goodwill, the subversion of interconnection agreement negotiations and increased strains on Wisconsin networks. Each of these arguments is based on the premise that defendant TCG and other local carrier competitors will rely on the reciprocal compensation payments ordered by defendant commission either to under bid plaintiff in obtaining the business of internet service providers or to gain a strategic advantage in current negotiations for interconnection agreements. However, the stay at issue controls the availability of reciprocal compensation only during the relatively short period it will take to reach a final decision on the matter It is unlikely that defendant TCG or plaintiff's other competitors will target ISP customers or drop their rates to those customers in reliance on reciprocal compensation payments when those payments could be lost in a matter of weeks. Similarly, because the legal status of reciprocal compensation requirements for ISP business remains unknown irrespective of the stay, issuance or denial of the stay should not benefit either parties' bargaining position in negotiations for new interconnection agreements.

encourage. As a result, the Court finds that these final two factors also weigh against Plaintiff's request for injunctive relief.

Having found that each factor of the test for preliminary injunctive relief militates against enjoining the MPSC Order requiring Plaintiff to cease and desist from failing to pay reciprocal compensation in accordance with its interconnection agreements, the Court denies Plaintiff's Motion.

C. Motion for Stay Pending FCC Decision


In addition to repeatedly requesting a stay of the MPSC Order, Plaintiff has also recently filed a motion requesting that the Court either refer this matter to the FCC or stay its own proceedings pending the issuance of the FCC's decision on the specific issue of whether calls to ISPs are local for the purpose of reciprocal compensation under the § 251(b)(5) of the Telecom Act. As noted above, on August 17, 1998, the FCC confirmed that it is presently reviewing the very issue on which this case turns. *Ex Parte Procedures Regarding Requests for Clarification of the Commission's Rules Regarding Reciprocal Compensation for Information Service Provider Traffic*, Public Notice, CC docket No. 96-98, 1998 FCC LEXIS 4191. Because the FCC's interpretation of this legal question is entitled to due deference by this Court, *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969); *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n. 9 (1984), it may well have an effect on the outcome of this case. As a result, the Court finds that a stay of this Court's proceedings in this case is appropriate pending the issuance of the FCC's ruling on this question. *See Wysinger v. Benton Harbor*, 968 F. Supp. 349, 355 (W.D. Mich. 1997). Plaintiff's Motion will, therefore, be granted in part.

IV. Conclusion

For the foregoing reasons, Plaintiff Ameritech's Motions for Stay pursuant to Rule 62 and for Preliminary Injunction pursuant to Rule 65 are denied. As a result, Plaintiff's Motion for Approval of Supersedeas Bond and for Leave to Deposit Funds with the Court are deemed moot. Finally, Plaintiff's Motion for Primary Jurisdiction Referral is granted insofar as the Court shall stay its proceedings pending the issuance of the FCC decision regarding reciprocal compensation for calls made to Internet Service Providers. Plaintiff is instructed to alert the Court when that decision has been rendered.

DATED in Kalamazoo, MI:

Aug 26, 1998


RICHARD ALAN ENSLEN
Chief Judge

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

TCG DETROIT, an AT&T company, and
a New York general partnership,

Plaintiff,

v

Case No. 98-88758-AW
Honorable Carolyn Stell

MICHIGAN BELL TELEPHONE CO.,
d/b/a AMERITECH MICHIGAN,
a Michigan corporation,

Defendant.

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**BRIEF OF MICHIGAN PUBLIC SERVICE COMMISSION
IN SUPPORT OF ITS MOTION FOR INTERVENTION,
MOTION FOR ORDER OF MANDAMUS, OR ALTERNATIVELY,
TEMPORARY RESTRAINING ORDER, PRELIMINARY OR
PERMANENT INJUNCTION, OR OTHER RELIEF, AND IN SUPPORT OF
MOTION FOR SHORTENED NOTICE FOR CONSIDERATION OF MOTIONS**

and

**BRIEF OF MICHIGAN PUBLIC SERVICE COMMISSION
IN SUPPORT OF MOTIONS OF PLAINTIFF TCG DETROIT**

I. INTRODUCTION

The Michigan Public Service Commission ("Commission" or "MPSC") files this brief in support of its above referenced motions filed in this case, and also in support of the motions filed by Plaintiff TCG Detroit in this case. The various motions seek enforcement of the MPSC's order issued in MPSC Case No. U-11502 which required Ameritech Michigan, Inc. ("Ameritech") to comply with the terms of its Interconnection Agreement with TCG Detroit on an immediate basis.

II. FACTS AND BACKGROUND

The MPSC has issued an order requiring Ameritech to immediately comply with the terms of its Interconnection Agreement with TCG Detroit. The MPSC order in MPSC Case No. U-11502 was issued following contested case procedures in accordance with the Michigan Administrative Procedures Act, 1969 PA 306, MCL 24.201, *et seq*; MSA 3.560(101), *et seq*, and the Commission Rules of Practice and Procedure, 1992 AACCS R 460.17101, *et seq*. The Commission order issued in MPSC Case No. U-11502, is attached to the Complaint for Mandamus of TCG Detroit filed in this case (Complaint, dated August 19, 1998, Exhibit A).

The MPSC's January 28, 1998 Order referenced above was issued in a consolidated case¹ involving a dispute over whether Ameritech owes reciprocal compensation² under interconnection agreements with competing providers of

¹MPSC Case Nos. U-11178; U-11502; U-11522; U-11553; and U-11554.

²The compensation involved is referred to as "reciprocal compensation" because each carrier agrees to pay the other carrier for the cost of completing calls to the other carriers' customers.

basic local exchange service (such as TCG Detroit) for calls made by customers of Ameritech to internet service providers that are customers of TCG Detroit (and other competing providers).

On or about July 3, 1997, Ameritech unilaterally began withholding reciprocal compensation to TCG Detroit (and other local exchange service providers). On August 21, 1997, TCG Detroit filed a request for declaratory ruling and application for resolution of the dispute with the MPSC (Case No. U-11502). On September 19, 1997, TCG Detroit filed a First Amended Petition for Declaratory Ruling and Application for Resolution with the MPSC.

Ameritech filed its answer to TCG Detroit's First Amended Petition on October 21, 1997. The MPSC consolidated the TCG Detroit case with three other cases brought by other local exchange carriers (see footnote 1).

On January 28, 1998, after conducting a full contested case proceeding, the MPSC ordered Ameritech to cease and desist from refusing to pay TCG Detroit reciprocal compensation pursuant to the interconnection agreement, to immediately resume payments, to pay all past due amounts owed within 10 days of the issuance of the order (with interest), and to pay TCG Detroit's attorney's fees.

Ameritech filed suit in U.S. District Court, Western District of Michigan (Docket No. 5:98-CV-18) against TCG Detroit and the MPSC Commissioners, seeking federal court review of the MPSC's January 28, 1998 Order. Ameritech also moved for a stay of enforcement of the MPSC's order pending review by the federal court.

The motion for stay was denied on February 11, 1998. On February 26, 1998, Ameritech filed a Claim of Appeal with the Michigan Court of Appeals (Docket No. 209829) and moved for a stay of proceedings. The Court of Appeals denied the motion for stay on March 27, 1998. On February 12, 1998, Ameritech filed a Motion for Approval of Supersedeas Bond and for Stay Pending Review, and on May 19, 1998 filed a Motion for Preliminary Injunction Pending Review of Commission's Order. Each of the aforementioned motions were filed in federal district court.

On August 26, 1998, the federal District Court issued its order denying Ameritech's Motion for Approval of Supersedeas Bond/Stay and denying Ameritech's Motion for Preliminary Injunction. See **Appendix C**. As of the date of this filing, there is no order from any court which stays the effectiveness of the MPSC's January 28, 1998 Order. Three separate Ameritech requests for a stay/preliminary injunction have been denied by the federal District Court. The Michigan Court of Appeals has also denied Ameritech's request for a stay.

On information and belief, Ameritech has not complied with the MPSC's order requiring compliance with the Interconnection Agreement pursuant to its January 28, 1998 order.

III. ARGUMENT.

This Court should issue an order of mandamus, or other appropriate injunctive order, requiring Ameritech to immediately comply with the MPSC's January 28, 1998 order. This Court specifically has jurisdiction to undertake such action pursuant to § 47, MCL 462.47; MSA 22.67 which states the following:

In addition to all the other remedies provided by this act for the prevention and punishment of any and all violations of the provisions hereof and of all orders of the commission, the commission, and likewise any person, firm or corporation interested, may compel compliance with the provisions of this act and with the orders of the commission by proceedings in mandamus, injunction or by other appropriate civil remedies.

This Court also has jurisdiction to entertain a mandamus order pursuant to MCR 3.305 and pursuant to the common law, which provides remedies in mandamus against utilities such as a telephone company. *Mahan v Michigan Telephone Co*, 132 Mich 242, 248; 93 NW 629 (1903); *Johnston v Mid-Michigan Telephone Corp*, 95 Mich App 364, 368; 290 NW2d 146 (1980).

In addition, the courts have specifically ruled in recent cases that the Circuit Court has jurisdiction to issue an injunction or other equitable order to enforce a statute or an MPSC order pending either administrative or appellate proceedings. *City of Marshall v PSC*, 206 Mich 666, 679-681 (1994); *Harsens Island St. Clair Flats Association and MPSC v Champion's Auto Ferry, Inc.*, St. Clair Circuit Court Docket No. A95-003123-CZ (order granting Plaintiff's motion for preliminary injunction dated May 14, 1996, attached hereto as **Appendix A**), and *Aurora Gas Company v Presque Isle Electric Cooperative*, Presque Isle County Circuit Court Docket No. 90-002156-AZ (injunction dated October 4, 1996, attached hereto as **Appendix B**).³

³The Court in City of Marshall enforced a statute subject to MPSC jurisdiction (1929 PA 69), pending the filing and resolution of a complaint before the MPSC. The Champion Auto Ferry case enforced MPSC rate orders pending further proceedings before the MPSC and resolution of Court appeals. Similarly, the Aurora Gas case involved enforcement of Act 69 pending a resolution of complaint issues before the MPSC.

MPSC orders are also by statute to be accorded *prima facie* lawfulness and validity in accordance with § 25, MCL 462.25; MSA 22.45(a), which states in part as follows:

All rates, fares, charges, classification and joint rates fixed by the commission and all regulations, practices and services prescribed by the commission shall be in force and shall be *prima facie*, lawful and reasonable until finally found otherwise in an action brought for the purpose pursuant to the provisions of section twenty-six [26] of this act, or until changed or modified by the commission as provided for in section twenty-four [24] of this act.

Accord: *Consumers Power v PSC*, 65 Mich App 73; 237 NW2d 189 (1975); *Attorney General v PSC*, 161 Mich App 506 (1987).

This Court should act promptly to enforce the MPSC orders because they have *prima facie* validity, and also because the MPSC order requiring Ameritech to comply with the terms of the interconnection agreement were the subject of very exhaustive contested case proceedings before the MPSC pursuant to the Administrative Procedures Act, 1969 PA 306, MCL 24.201 *et seq*; MSA 3.560(101) *et seq*, and the Commission's Rules of Practice and Procedures, 1992 AACSR 460.17101, *et seq*. In addition, Ameritech has sought a stay of proceedings in both the Michigan Court of Appeals and in federal district court. Both courts have rejected Ameritech's request for a stay.

Although counsel for the MPSC has not seen or reviewed any of Ameritech's possible responses to the complaint or motions of Plaintiff TCG Detroit in this case, it is hard to imagine what possible grounds could justify Ameritech's position that it

may unilaterally ignore MPSC orders pursuant to its own whim and caprice. This Court should not countenance such an approach as it will lead to lawless disrespect for Michigan regulatory statutes, and will seriously undermine the authority of the MPSC in its required regulation of the telecommunications industry (which includes Plaintiff TCG Detroit, as well as Defendant Ameritech).

Issuance of a mandamus or injunctive order, requiring immediate compliance with the MPSC's order, would also be just because Ameritech would still have the remedy of appealing any such court order to the Michigan Court of Appeals, wherein it could attempt to argue that the order either should not have been issued, or that it should be vacated. In the meantime, the interests of the Plaintiff TCG Detroit and Intervening Plaintiff MPSC, and the general public interest, clearly warrants the issuance of prompt orders requiring compliance with the MPSC order at this time.

IV. CONCLUSION AND RELIEF.

For the above reasons, and for the additional reasons presented in the accompanying motions filed by Intervening Plaintiff Michigan Public Service Commission, the MPSC requests this Honorable Court to grant its Motion for Intervention, Motion for Shortened Notice to Consider Motions, and Motion for

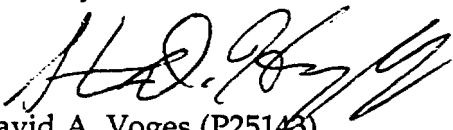
Mandamus or other equitable relief. The MPSC requests such further and consistent relief which is lawful and reasonable.

Respectfully submitted,

MICHIGAN PUBLIC SERVICE COMMISSION

By its attorneys:

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A handwritten signature in black ink, appearing to read 'D. A. Voges', is written over the printed names of the Assistant Attorneys General.

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DATED: September 10, 1998

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STATE OF MICHIGAN

SEP 30 1998

30TH JUDICIAL CIRCUIT COURT (INGHAM COUNTY)

TCG DETROIT, an AT&T Company,
and a New York General Partnership
Plaintiff,

v

Case No. 98-88758-AW

MICHIGAN BELL TELEPHONE COMPANY,
d/b/a AMERITECH MICHIGAN,
Defendant.

VIDEO SHOW CAUSE HEARING

BEFORE THE HONORABLE RICHARD D. BALL, CIRCUIT COURT JUDGE

Lansing, Michigan - Wednesday, September 16, 1998

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WITNESSES:

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None.

EXHIBITS:

Identified

Received

None.

1 Lansing, Michigan

2 Wednesday, September 16, 1997 - 4:06 p.m.

3 THE COURT: First of all, are you all ready? Are we
4 ready to go? First of all, I'm not Judge Stell. My name is
5 Richard Ball B-A-L-L. I am a district Judge in East Lansing.
6 Judge Stell is ill. She is expected to be ill until about
7 November 1st, although, it is not completely clear to me. My
8 colleague in East Lansing, Judge Jordon, and I are alternating
9 Wednesdays, taking motion days for Judge Stell--trying to keep
10 her cases going to some extent. So I'm here today by State
11 Court Administrative Office direction as an acting circuit
12 judge.

13 Now before we begin here, I would like to just test my own
14 understanding of this file. So let me ask Ameritech's lawyer
15 to come forward and indicate your appearance for me sir.

16 MR. DEMPSEY: Good afternoon, your Honor. My name is
17 Jack Dempsey. I'm with the law firm of Dickinson Wright, PLLC.
18 Also at counsels' table is Edward Becker, also of that firm,
19 and Mr. Dennis Friedman of the law firm of Mayer, Brown & Platt
20 of Chicago, Illinois. In fact, we filed earlier today a motion
21 for his admission to practice with regard to this case. I
22 would like to make that motion right now. He is a member in
23 good standing of the Illinois bar and otherwise is an
24 upstanding citizen.

25 Tape 1003, 09-16-98, 16:07:16

1 THE COURT: What's the name, sir?

2 MR. DEMPSEY: Dennis Friedman.

3 THE COURT: Friedman?

4 MR. DEMPSEY: F-R-I-E-D-M-A-N.

5 THE COURT: Before we proceed, let me have the

6 appearances of other counsel here and who you represent please?

7 MR. COY: Roderick S. Coy of Clark Hill, PLC, appearing

8 on behalf of TCG Detroit, an Ameritech company. Your Honor--

9 I'm sorry--an AT&T Company. What a slip, huh? Don't get

10 nervous; things are happening rapidly. Your Honor, with me

11 today is Douglas Traveris (phonetic) of AT&T's legal department

12 and we would also make a motion orally that he be permitted to

13 participate with us today. He's a member in good standing of

14 the bar of Illinois and the bar of Ohio.

15 THE COURT: Welcome.

16 MR. TRAVERIS: Thank you.

17 MR. VOGES: Your Honor, I'm David Voges, assistant

18 attorney general, representing the Michigan Public Service

19 Commission in this proceeding.

20 THE COURT: Do I hear any objection to granting the

21 motions to admit counsel from Illinois on both sides or either

22 side as the case may be? Hearing none, motion granted.

23 All right. Let me see if I understand what's happened

24 here Mr. Dempsey--and you and I go back away, but haven't seen

25 each other for awhile.

1 MR. DEMPSEY: That's correct.

2 THE COURT: Twenty-seven years probably.

3 MR. DEMPSEY: It's a delight to be here in front of you

4 again.

5 THE COURT: Twenty-two years.

6 MR. DEMPSEY: I wasn't going to count the numbers off.

7 THE COURT: I was Mr. Dempsey's resident assistant back

8 in Case Hall, Michigan State University in 1970--maybe.

9 MR. DEMPSEY: 1970 - '71.

10 THE COURT: One year he couldn't stand it anymore and

11 he left.

12 MR. DEMPSEY: As long, your Honor, as you don't go into

13 any of the stories that might be irrelevant here.

14 THE COURT: I don't remember anything.

15 MR. DEMPSEY: Very good.

16 THE COURT: As I understand it, there was some matter--

17 contested hearing before the Public Service Commission which

18 ended in late 1997 and ended with an order that determined that

19 Ameritech ought to pay TCG some money, correct so far?

20 MR. DEMPSEY: That's essentially correct, your Honor.

21 The order was--

22 THE COURT: I want to try to boil this down the best I

23 can too. Ameritech then filed suit nearly--almost immediately

24 in a federal district court claim that the MPSC order was shall

25 we say illegal under federal law.

1 MR. DEMPSEY: Again, largely correct, your Honor.

2 THE COURT: That suit was filed in early 1998 and at

3 least twice, if not three times, Ameritech has approached Judge

4 Enslin and asked for a stay enforcement of the MPSC order and

5 then denied.

6 MR. DEMPSEY: Essentially correct, your Honor. We asked

7 for a stay which Judge Bell denied. Then in August Judge

8 Enslin denied other motions that we had filed. So really only

9 on two occasions.

10 THE COURT: There is also an appeal pending filed by

11 Ameritech in the Michigan Court of Appeals.

12 MR. DEMPSEY: Correct.

13 THE COURT: And I'm not sure from reading the file what

14 the substance of that appeal is, but I know there is a

15 reference to it being a back up appeal in the event that I

16 guess Judge Enslin doesn't serve jurisdiction or rules against

17 Ameritech--whatever. It's there in the event it's necessary

18 for you to pursue an appeal in the Michigan Court of Appeals.

19 MR. DEMPSEY: Yes, your Honor. We had filed that appeal

20 because we have to do that within 30 days of the commission's

21 order under state law or otherwise the Court of Appeals has no

22 jurisdiction. So it was obviously necessary to do that in the

23 event the federal court held that it did not have jurisdiction.

24 However, in July Judge Enslin ruled that he had exclusive

25 jurisdiction. So that's--

1 THE COURT: Exclusive jurisdiction would mean that he
2 has exclusive jurisdiction to determine if the order entered by
3 the MPSC was consistent with the requirements of federal law.
4 Is that accurate?

5 MR. DEMPSEY: That's correct.

6 THE COURT: All right. At any rate, at some point the
7 Michigan Court of Appeals was approached and a stay enforcement
8 was requested and not granted, is that correct?

9 MR. DEMPSEY: That's not really correct, your Honor. We
10 had asked the court--the appeals court for a stay of proceeding
11 simply to hold the case in abeyance because of the pendency of
12 the federal case, and the court denied the motion, and
13 therefore the case has proceeded, but we did not ask for a stay
14 of the commission's order. Now, there is one other stay
15 request I should mention. I'm not sure it's apparent from the
16 file, but right after the order was issued we filed a stay
17 request with the commission itself, and that is still pending.
18 We have not heard from the commission of any disposition of
19 that motion. So that remains outstanding.

20 THE COURT: Bottom line with regard to the MPSC order
21 is that it's been entered, and there has been no stay of any
22 kind issued by any court until today, correct?

23 MR. DEMPSEY: Correct.

24 THE COURT: Now, apparently the MPSC is now asking this
25 court to intervene in part to seek enforcement of the MPSC